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QUESTIONS PRESENTED

1. Whether, by voluntarily dismissing its client's complaint pursuant to Fed. R. Civ. P. 41(a)(1)(i), petitioner deprived the district court of jurisdiction to act on a motion for Rule 11 sanctions that was filed before the voluntary dismissal.

2. Whether the court of appeals, which determined that petitioner's admitted failure to conduct any inquiry with respect to fundamental allegations of the complaint was patently unreasonable, employed an improper "abuse of discretion" standard in reviewing the district court's decision that Rule 11 had been violated.

3. Whether the court of appeals correctly determined that the district court should award respondents attorney's fees reasonably incurred in successfully defending against petitioner's appeal of the Rule 11 sanctions.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to respondent Hartmarx Corporation, respondents include two wholly-owned subsidiaries of Hartmarx Corporation, Hart, Schaffner & Marx and Hickey-Freeman Co., Inc. Hartmarx Corporation has no parent companies or subsidiaries (except wholly-owned subsidiaries).

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-275

COOTER & GELL,
Petitioner,

v.

HARTMARX CORPORATION, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 875 F.2d 890. The opinion of the district court imposing Rule 11 sanctions on petitioner (Pet. App. 18a-31a) is reported at 120 F.R.D. 439.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1989. The petition for certiorari was filed on August 16, 1989, and was granted on October 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES OF PROCEDURE INVOLVED

On behalf of its client, petitioner filed a frivolous class action complaint against respondents. Pursuant to Fed. R. Civ. P. 11, the district court awarded respondents attorney's fees reasonably incurred in responding to that complaint. Rule 11 provides, in pertinent part:

> If a pleading, motion, or other paper is signed in violation of this rule, the court * * * shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Prior to the district court's fee award under Rule 11, the complaint was voluntarily dismissed pursuant to Fed. R. Civ P. 41(a)(1)(i), which provides, in pertinent part:

> Subject to the provisions of Rule 23(e) [governing class actions] * * * an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs.

After affirming the district court's award of attorney's fees, the court of appeals remanded the case to the district court for an award of attorney's fees reasonably incurred in defending the Rule 11 order on appeal. Petitioner contends that Fed. R. App. P. 38 precluded the additional award in the absence of a finding that its appeal was frivolous. Rule 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT

A. Introduction

The Rule 11 award giving rise to this case followed years of litigation between Danik, Inc., a client of petitioner Cooter & Gell, and respondent Hartmarx Corporation ("Hartmarx") and various subsidiaries of Hartmarx. The litigation began when a Hartmarx subsidiary filed a breach of contract lawsuit against Danik arising from Danik's failure to pay for goods manufactured by the Hartmarx subsidiary. In response, Cooter & Gell brought four separate antitrust actions against Hartmarx companies, including two purported class actions. Cooter & Gell's actions had nothing to do with the resolution of genuine antitrust disputes and did not result in a single finding that Hartmarx or any of its subsidiaries had violated the antitrust laws. Rather, the lawsuits were a transparent effort to ward off Hartmarx's attempt to press its contract claim and, when that tactic failed, to force Hartmarx to run a litigation gauntlet in order to obtain and collect on a final judgment.

One of Cooter & Gell's class action complaints was based on allegations so flatly contrary to actual fact that Hartmarx sought sanctions under Fed. R. Civ. P. 11. Before imposing sanctions, the district court held a hearing on the motion and carefully reviewed affidavits from Cooter & Gell (J.A. 16-27) describing the law firm's prefiling inquiry into the basis for the allegations of that complaint, including affidavits of the two attorneys who signed the complaint, and deposition testimony of Danik's principal owner (*id.* at

28-40), who had verified the complaint. The record of the proceedings before the district court so clearly established that Cooter & Gell abandoned any pretense of fidelity to minimum professional standards before filing the complaint that the court of appeals found "no difficulty in affirming liability under Rule 11 here." Pet. App. 11a.

Strictly speaking, the inadequacy of petitioner's prefiling inquiry is not an issue encompassed by the three questions that this Court agreed to review. Predictably, however, petitioner has devoted a substantial portion of its opening brief to defending its conduct in the district court and to attacking that court's decision to impose sanctions. Because petitioner's recitation is frequently at odds with the facts, we are obliged to set the record straight. Moreover, this record well illustrates why vigorous enforcement of Rule 11 is critically important to eliminating the plague of ill-conceived and wrongly-motivated lawsuits that infects the federal courts.

B. The Repeated Antitrust Suits Against Hartmarx And Its Subsidiaries

Petitioner Cooter & Gell is a law firm based in Washington, D.C. Respondent Hartmarx is a holding company that manufactures and distributes men's clothing across the United States through various subsidiaries, including respondents Hickey-Freeman and Hart, Schaffner & Marx. For approximately three years, petitioner represented a Washington area clothing retailer, Danik, Inc., in four antitrust actions brought against Hartmarx and five Hartmarx affiliates.

The flurry of antitrust litigation followed in the wake of the filing of a breach of contract action

against Danik by Intercontinental Apparel, Inc., a Hartmarx subsidiary. Intercontinental alleged that Danik had failed to pay for approximately $100,000 of merchandise. Cooter & Gell, on behalf of Danik, filed a counterclaim alleging that Intercontinental had engaged in price discrimination in violation of the Robinson-Patman Act. In March 1984, the district court granted summary judgment in favor of Intercontinental on its breach of contract claim, and that judgment was affirmed on appeal. *Danik, Inc.* v. *Intercontinental Apparel, Inc.*, No. 84-5186 (D.C. Cir. 1985).[1] In February 1985, a jury returned a verdict for Intercontinental on Danik's Robinson-Patman Act counterclaim. The court of appeals again affirmed, stating that the issues raised in Danik's appeal were "inconsistent with applicable precedent, sound antitrust policy and common sense." *Intercontinental Apparel, Inc.* v. *Danik, Inc.*, No. 85-5284 (D.C. Cir. 1986).

In November 1983, while the litigation described above was proceeding in district court, Cooter & Gell prepared two different antitrust complaints against Hartmarx and several of its subsidiaries. Each of those complaints purported to be brought on behalf of Danik and a large class of men's clothing retailers. Petitioner presented drafts of the complaints to counsel for Hartmarx. Although Cooter & Gell now con-

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[1] Pleadings and court opinions in the three antitrust actions filed against Hartmarx other than the action that gave rise to Rule 11 sanctions were not included in the Joint Appendix submitted to this Court. However, all such pleadings and opinions cited herein were submitted to the court of appeals. For the convenience of this Court, copies were lodged with the Clerk at the time this brief was filed.

tends (Br. 7) that the complaints were not "procedural devices to promote a settlement in the [breach of contract] case," the record shows otherwise. In an affidavit submitted to the district court, one Cooter & Gell attorney specifically described how he had linked a favorable settlement of the original collection action to Danik's decision to proceed with the two class actions (J.A. 26-27):

> Prior to my filing these Complaints, I scheduled a meeting with counsel for [Hartmarx] in the underlying collection suit wherein I presented counsel with draft copies of those Complaints and outlined a settlement offer which encompassed the collection suit and the two class actions. I made clear at that meeting and in subsequent conversations * * * with counsel for [Hartmarx], that it was not my intention to simply "wash out" the collection with my forebearance in filing these class actions. I stated to counsel that I felt that [Hartmarx] faced more exposure from these class actions than did my client in the underlying collection suit, and that it was my intention to give [Hartmarx] an opportunity to consider settlement of the class action suits prior to the certification of the class actions, after which time I would no longer be able to engage in settlement discussions on my client's behalf alone.

Hartmarx rejected Danik's "settlement offer" and, true to its word, Cooter & Gell filed the two class action complaints in the United States District Court for the District of Columbia. J.A. 3-14; *Danik, Inc.* v. *Intercontinental Apparel, Inc.*, No. 83-3569 (D.D.C.) (Complaint filed November 29, 1983). Both lawsuits were assigned to Judge Oliver Gasch,

who was presiding over the initial breach of contract/Robinson-Patman Act litigation. On April 30, 1984, Cooter & Gell filed voluntary dismissal notices with respect to the two class actions. J.A. 1 (docket entry 28); *Danik, Inc.* v. *Intercontinental Apparel, Inc.*, No. 83-3569 (D.D.C.) (Notice of Dismissal filed Apr. 30, 1984). Shortly thereafter, petitioner filed motions to dispense with notice to the purported classes and, in July 1984, the district court granted the motions, making the dismissals effective.

In September 1984, Cooter & Gell filed yet another antitrust action against three Hartmarx subsidiaries and an unrelated clothing retailer in the United States District Court for the District of Maryland.[2] The Maryland court granted Hartmarx's motion to transfer the action to Judge Gasch on the grounds that the issues raised in the complaint were identical or substantially identical to the issues in one of the antitrust lawsuits described above. *Danik, Inc.* v. *M. Wile & Co.*, No. H-84-3417 (D. Md.) (Jan. 3, 1985). That action was then stayed pending final resolution of the original breach of contract Robinson-Patman Act litigation and was ultimately dismissed voluntarily in July 1986. *Danik, Inc.* v. *M. Wile & Co.*, No. 85-0246 (D.D.C.) (Notice of Dismissal filed July 2, 1986).

C. Cooter & Gell's Pre-Filing Inquiry In This Case

The complaint that gave rise to the district court's ruling that Cooter & Gell violated Rule 11 was one of the two class action complaints filed in November 1983. That complaint alleged that Hartmarx was

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[2] Petitioner makes no mention of this fourth lawsuit and incorrectly asserts (Br. 3) that only three lawsuits were filed against Hartmarx.

engaged in a massive nationwide antitrust conspiracy involving price-fixing, resale price maintenance, territorial exclusivity, and other "unfair competition practices." J.A. 3-14. The factual premise of the entire complaint was the allegation that Hartmarx sold Hart, Schaffner & Marx and Hickey-Freeman suits to only "one retailer in each major metropolitan area in the United States." *Id.* at 11. The complaint was signed by two attorneys from Cooter & Gell (C.A. App. 47) and was verified (J.A. 15) by Danik's president and principal owner.

Apart from the fact that exclusive dealerships are a common method of distribution in a variety of industries and are perfectly legal under federal antitrust laws, the allegation that Hartmarx systematically employed exclusive dealers was completely false. Affidavits from Hart, Schaffner & Marx and Hickey-Freeman executives established that "Hart, Shaffner and Marx suits are distributed to more than one retailer in each of fifteen major metropolitan areas save Washington, D.C.," and that "except in Washington, D.C. and Baltimore, Maryland, Hickey-Freeman suits are sold to more than one retailer in each of the same fifteen major metropolitan areas." Pet. App. 21a. "Indeed, these executives reported that each brand was sold to as many as 20 different retailers in some markets." *Id.* at 4a. The affidavits further established that neither Hart, Shaffner & Marx nor Hickey-Freeman had exclusive dealer agreements with any of their respective retailers. *Id.* at 21a.

After moving to dismiss the complaint, Hartmarx also moved for sanctions under Rule 11. In opposing the Rule 11 motion, petitioner submitted three affidavits that described the firm's pre-filing inquiry.

J.A. 16-17, 22-27. Both of the attorneys who had signed the complaint executed affidavits, as did a secretary employed by the law firm who had conducted the bulk of the firm's pre-filing investigation. In addition, a third attorney at the firm submitted an affidavit describing an investigation he had conducted after receiving the Hart, Schaffner & Marx and Hickey-Freeman affidavits. *Id.* at 18-21. Respondents did not challenge the accuracy of the statements made in the Cooter & Gell affidavits and the district court accepted the affidavits as true (as did the court of appeals). Those affidavits conclusively demonstrated petitioner's violation of Rule 11.

First, contrary to petitioner's repeated assertion in its brief before this Court that its client was the instigator of the allegations against Hartmarx (see Br. 5, 6, 7, 13, 14, 36, 37), petitioner's client testified that he had no information to support those allegations other than what he had been told by his attorneys (J.A. 33-34). See also Pet. App. 29a. The same was true with respect to all other material allegations of the complaint. J.A. 39. Thus, this case does not involve a situation where an attorney relied on the misguided assertions of a client in drafting the factual allegations of a complaint and was then confronted with Rule 11 proceedings. Just the opposite is true; *petitioner presented its client with unfounded accusations against Hartmarx and the client then signed off on those accusations.*

Second, the Cooter & Gell affidavits establish the clear insufficiency of the firm's pre-filing inquiry, which began and ended with a series of telephone calls to salesmen at a few randomly selected clothiers in Washington, D.C., Baltimore, Philadelphia, and

New York. J.A. 16-17. In each of those calls, the salesman purportedly said that he knew of only one retailer in his city that sold Hart, Schaffner & Marx suits. *Ibid.* But none of the salesmen even suggested that the supposed lack of additional Hart, Schaffner & Marx outlets was the result of an exclusive dealer policy. Moreover, in none of the calls was the salesman asked *anything* about Hickey-Freeman; in none was he asked *anything* about a refusal by Hartmarx to deal with any retailers; in none was he asked *anything* about restrictions on the territory in which Hartmarx authorized its retailers to sell its products; and in none was he asked *anything* about the prices for which Hart, Schaffner & Marx or Hickey-Freeman suits were sold in his city. Pet. App. 23a-24a. Despite its desire to establish that Hartmarx had an anticompetitive policy of nationwide scope, Cooter & Gell made no phone calls to retailers outside Washington, Baltimore, Philadelphia, and New York. *Id.* at 23a.

After it obtained the Hart, Schaffner & Marx and Hickey-Freeman affidavits that refuted the allegations of the complaint, the law firm chose to conduct an additional "investigation." This investigation consisted of a review of telephone directories in various major cities and additional phone calls to salesmen, aimed at determining whether Hartmarx had "an exclusive retailer agent policy" for the sale of Hart, Schaffner & Marx and Hickey-Freeman suits. J.A. 18-19. Even that skimpy investigation quickly revealed that multiple retailers existed for Hartmarx menswear in Los Angeles, Boston, and Philadelphia (one of the four cities encompassed by petitioner's original investigation). *Id.* at 19-20. Despite confirming what the Hart, Schaffner & Marx and

Hickey-Freeman affidavits had established—that the fundamental factual premise of the complaint was wrong—petitioner and its client opposed Hartmarx's motion to dismiss (and the Rule 11 motion). Litigation of the unfounded complaint continued for three months before petitioner filed a notice of voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i). Because the complaint had been brought as a class action, however, dismissal was not effective until after the district court waived notice to putative class members. The district court did so on July 30, 1984.

D. The Decision Of The District Court

Six weeks after the complaint was voluntarily dismissed, the district court held a hearing on the Rule 11 motion. In December 1987, the court ordered Hartmarx to submit a statement of costs and attorney's fees. Pet. App. 32a. Cooter & Gell and Danik (now represented by other counsel) separately filed objections to the fee request and reiterated their arguments as to why the court should deny the Rule 11 motion. In February 1988, the court granted the motion, holding that the "pre-filing inquiry into the facts underlying these allegations was grossly inadequate." *Id.* at 23a. The court awarded Hartmarx a total of $32,103.78 in costs and attorney's fees. It assessed two-thirds of the award ($21,402.52) against petitioner and the remainder ($10,701.26) against its client. *Id.* at 29a.

With respect to the claim that Hartmarx maintained exclusive agreements with one retailer in every major metropolitan area in the United States, the district court found two "obvious deficiencies" in Cooter & Gell's pre-filing inquiry. Pet. App. 23a. "First, it concentrated solely upon Hart, Schaffner

and Marx menswear and thus in no way justified the claim of exclusive retail agency arrangements for Hickey-Freeman apparel. Second, it was limited to four eastern cities and consequently provided no support for the allegation that exclusive arrangements existed in *every* major metropolitan area." *Ibid.* (emphasis in original). In addition, the court took Cooter & Gell to task for the anemic nature of its investigation within those four cities. Specifically, the law firm "contacted only a few retailers in cities where dozens of retailers were in business" and directed its telephone calls to salesmen, without attempting to contact "management personnel who might have personal knowledge of the alleged exclusive retail agency policy." *Id.* at 24a.

The district court also pointed out that, even if Hartmarx had been party to exclusive dealing agreements, such agreements "by themselves, are not per se violative of antitrust laws." Pet. App. 24a. Exclusive dealing arrangements are analyzed under the "rule of reason" and can give rise to liability only if an antitrust plaintiff is able "to plead, and show, anticompetitive effects" flowing from the arrangements. *Ibid.* The court found that Cooter & Gell "failed to make any investigation whatsoever into the factual basis" for a claim that Hartmarx's distribution policies had brought about the anticompetitive effects necessary to prove an antitrust violation. *Ibid.*

E. The Decision Of The Court Of Appeals

Cooter & Gell appealed and the court of appeals affirmed.[3] The D.C. Circuit rejected the argument,

[3] Danik separately appealed the award of Rule 11 sanctions, but that appeal was dismissed for failure to prosecute. Pet. App. 2a.

raised for the first time on appeal, that the voluntary dismissal of Danik's complaint had deprived the district court of jurisdiction to rule on Hartmarx's Rule 11 motion. The court explained (Pet. App. 9a-10a):

> Rule 11 sanctions are meant to deter the filing of unfounded pleadings, which is an abuse of the judicial process. As in criminal contempt, the court has an interest in deterring such conduct independent of the burdened party's interest in recovering its expenses. Accordingly, a court may award Rule 11 sanctions or issue a contempt citation *sua sponte*. * * * In relevant respects, therefore, Rule 11 is analogous to criminal contempt; the systemic interest in its proper functioning requires that it be available in appropriate circumstances notwithstanding a private party's effort to cut its losses and run out of court, using Rule 41 as an emergency exit.

The court of appeals also reviewed the record that established Cooter & Gell's liability under Rule 11. Like the district court, it accepted Cooter & Gell's own "account of their efforts" prior to filing the complaint. Pet. App. 11a. And that account was enough to demonstrate the law firm's violation of the Rule: "It is impossible to see how 'no inquiry' could be a 'reasonable inquiry' with regard to the [Hickey-Freeman] allegation or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere." *Ibid.* Because those deficiencies went "to the heart of the complaint," the court below found it unnecessary to consider whether Rule 11 was violated by Cooter & Gell's failure to inquire into the anticompetitive effects essential to a rule of reason claim. *Id.* at 13a.

In addition, the court of appeals rejected Cooter & Gell's contention that the district court abused its discretion in setting the amount of the sanction. *Id.* at 13a-14a.

Finally, the court of appeals agreed with Hartmarx that it was entitled to return to the district court and request an additional award for attorney's fees reasonably incurred in defending the Rule 11 award on appeal. Borrowing from its earlier decision in *Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168, 1179 (D.C. Cir. 1985), the court noted that "[i]t is very possible that appellate expenses might exceed substantially the sanction in the district court, thus forcing many litigants in [Hartmarx's] position to conclude that the vindication of the Rule 11 interests is not worth the candle." Pet. App. 14a. Accordingly, the court of appeals remanded the case to the district court for the limited purpose of determining the amount of additional fees due Hartmarx. *Id.* at 16a.

SUMMARY OF ARGUMENT

Rule 11 of the Federal Rules of Civil Procedure prohibits pleadings and other court filings that lack a reasonable legal or factual basis or that are motivated by an improper purpose. Once the district court finds a violation, it is *required* to impose an appropriate sanction. The Rule allows the court discretion in selecting the sanction, and expressly authorizes an order requiring the violator to pay the expenses reasonably incurred by the victim "because of" the violation, including a reasonable attorney's fee.

Petitioner, on behalf of its client, filed a baseless antitrust complaint against respondents. The district court found that the complaint violated Rule 11 and

ordered petitioner and its client to pay respondents the attorney's fees reasonably incurred as a result of the violation. After fully reviewing the record, the court of appeals found "two obvious deficiencies" in petitioner's pre-filing inquiry and therefore had "no difficulty in affirming liability under Rule 11." In addition, the appellate court remanded the case to the district court for an award of attorney's fees reasonably incurred in defending the Rule 11 sanction on appeal.

Petitioner seeks to avoid the consequences of its actions in a number of ways. First, it argues that because it dismissed its frivolous lawsuit voluntarily, the district court had no authority to rule on the Rule 11 motion that was pending at the time of dismissal. Second, it argues that the court of appeals was too deferential in reviewing the district court's order imposing the sanction and that the case should be remanded for review under a more searching standard. Finally, it argues that the court of appeals had no authority to preserve the deterrent effects of the sanction by requiring that petitioner pay the costs incurred by respondents in defending the Rule 11 award on appeal. None of these arguments has any basis in the language or underlying policies of Rule 11.

Rule 11 itself contains no exception for violators who voluntarily dismiss their cases before the district court has an opportunity to impose sanctions. Indeed, creating such an exemption would serve only to undercut Rule 11's broad policy of deterring the filing of frivolous or improperly motivated lawsuits. If plaintiffs were permitted to escape sanctions merely by dismissing their cases without prejudice, the courts would be burdened with additional unnecessary litigation and defendants would be forced to

commit resources to defend claims that have no merit whatever. Fortunately, Fed. R. Civ. P. 41(a)(1), which governs voluntary dismissals, in no way requires these deleterious results. Rule 41 states only that a plaintiff may voluntarily dismiss its complaint without prejudice prior to service of an answer or motion for summary judgment. The imposition of Rule 11 sanctions following a voluntary dismissal does not affect that guarantee.

The stringent standard of review that petitioner asks this Court to establish also would undermine the policies of Rule 11. But the Court need not—and should not—reach this issue because it plainly would have no effect on the outcome of this case. After thoroughly reviewing the record compiled on the Rule 11 motion, the court of appeals concluded that "[i]t is impossible to see how 'no inquiry' could be a 'reasonable inquiry' * * * or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere." Plainly, this "obvious[ly] deficien[t]" inquiry would constitute a violation of Rule 11 no matter what the standard applied by the court of appeals. In any event, if this Court desires to reach the standard of review issue, it should apply the analysis established in *Pierce* v. *Underwood*, 108 S. Ct. 2541 (1988), and adopt the abuse of discretion standard currently employed by nine circuits.

Finally, petitioner's effort to restrict the ability of district courts to require payment of attorney's fees reasonably incurred in defending Rule 11 awards on appeal must be rejected. The Rule expressly permits courts to award fees incurred "because of" the violation, and fees incurred in defending a Rule 11 award on appeal clearly satisfy that standard. Moreover, the policies of the Rule demand this result. If vic-

tims of Rule 11 violations were not compensated for expenses incurred in sucessfully defending Rule 11 awards on appeal, they would often have little incentive to resist challenges to such sanctions. That would impose additional costs on the judicial system and would undermine the usefulness of Rule 11 as a deterrent to frivolous and improperly motivated filings.

ARGUMENT

I. DISMISSAL OF A LAWSUIT WITHOUT PREJUDICE UNDER FED. R. CIV. P. 41(a)(1)(i) DOES NOT DEPRIVE THE DISTRICT COURT OF AUTHORITY TO IMPOSE RULE 11 SANCTIONS FOR PRE-DISMISSAL CONDUCT

Petitioner contends (Br. 20-30) that Danik's voluntary dismissal of the lawsuit against Hartmarx pursuant to Fed. R. Civ. P. 41(a)(1)(i)—which occurred *after* Hartmarx filed its motion for Rule 11 sanctions—deprived the district court of the authority to impose sanctions in this case. Adoption of that contention would, of course, open a gaping loophole in Rule 11. Any plaintiff that believed it might be sanctioned for the filing of a baseless complaint could inflict the harm the Rule is intended to prevent, yet avoid any penalty by dismissing its case before the court has an opportunity to impose a sanction. Consequently, defendants would be put to the burden and expense of defending against baseless claims, and the judicial system needlessly would incur an increase in its already considerable case load. Such results are completely at odds with the salutary purposes of Rule 11 and cannot be justified by either the language or the policies of Rule 41.

Rule 11 expresses an unambiguous mandate to bench and bar. The Rule forbids attorneys to file court papers that lack a reasonable factual or legal basis or that have been activated by an improper pur-

pose. Furthermore, it *requires* courts to impose an appropriate sanction upon attorneys (and/or their clients) who file papers that violate the Rule. The Rule on its face admits of *no* exceptions. Nonetheless, petitioner would have this Court fashion a huge exception for attorneys who file court papers that violate Rule 11 but who dismiss their clients' lawsuits voluntarily before the court imposes sanctions.

Petitioner's proposed exception is entirely inconsistent with the purposes of Rule 11. The drafters of the Rule intended to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." Rule 11, Advisory Committee Note, reprinted at 97 F.R.D. 165, 198 (1983); see also *Pavelic & LeFlore* v. *Marvel Entertainment Group*, No. 88-791, slip op. at 3 (Dec. 5, 1989) (Marshall, J., dissenting) ("the Rule is *explicitly* designed to deter improper pleadings, motions, and papers") (emphasis in original). This policy would be utterly undermined if the signers of baseless complaints could obtain a reprieve merely by withdrawing their cases prior to the imposition of sanctions. As the court below cogently explained (Pet. App. 8a):

> If a party could immunize itself from a meritorious Rule 11 motion by voluntarily dismissing its case, the risks associated with the filing of an inadequately investigated complaint would be significantly diminished; and as the price of such misconduct fell, of course, its frequency would rise.

Indeed, the exemption advocated by petitioner would prove particularly useful to the most egregious violators of Rule 11—those who file a complaint for an improper purpose. If a party desires to use the litigation process for the purposes of harassment, the filing of a complaint is likely to serve that improper goal. The initiation of a lawsuit imposes on the defendant immediate economic, logistic, and possibly emotional burdens. Moreover, as happened here, the allegations in the lawsuit may attract public attention, thereby causing harm to the defendant's reputation and/or business.[4] Thus, substantial harm to the defendant, as well as to the integrity of the legal system, may be accomplished when or shortly after a complaint is filed. "To hold that a district court has no power to order sanctions after a voluntary dismissal is to emasculate Rule 11 in those cases where wily plaintiffs file baseless complaints, unnecessarily sap the precious resources of their adversaries and the courts, only to insulate themselves from sanctions by promptly filing a notice of dismissal." *Schering Corp.* v. *Vitarine Pharmaceuticals, Inc.*, Nos. 89-5309, 89-5310, slip op. at 13 (3d Cir. Nov. 14, 1989) (1989 U.S. App. LEXIS 17064).[5]

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[4] See *Dash's Brings Suit Against Hartmarx*, Washington Post, Dec. 1, 1983 at F1.

[5] Amici Association of Trial Lawyers of America ("ATLA") and Public Citizen assert (ATLA Br. 10; Pub. Cit. Br. 7) that defendants could foreclose the voluntary dismissal option by filing an answer and, if they so desire, a Rule 12(c) motion for judgment on the pleadings. The last thing the judicial system needs, however, is an incentive for defendants to file unnecessary answers or motions, thereby triggering a time-consuming and expensive discovery process. Moreover, as the court below aptly concluded (Pet. App. 8a), "[u]nder Rule 11, * * * the defendant may stand on its motion to dismiss coupled with a motion for sanctions—as Hartmarx has done—and need not incur the burden of further pleadings. It is no answer to say that the defendant may preserve its Rule 11 motion only by incurring further unnecessary costs."

To make matters worse, the exemption advocated by petitioner cannot logically be limited to violators of Rule 11. Contemnors and violators of 28 U.S.C. § 1927 also would be immune from sanctions under its reading of Rule 41. And yet, as the Seventh Circuit has pointed out, it would be an absurd system indeed in which a litigant could avoid the consequences of a contempt of court merely by voluntarily dismissing its lawsuit before the court has a chance to respond to the contempt. *Szabo Food Serv., Inc.* v. *Canteen Corp.*, 823 F.2d 1073, 1079 (7th Cir. 1987), cert. dismissed, 108 S. Ct. 1101 (1988). Similarly, it strains logic to suggest that an attorney who vexatiously multiplies legal proceedings can escape penalty under 28 U.S.C. § 1927 merely by persuading his client to voluntarily dismiss under Rule 41.[6]

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[6] ATLA contends (ATLA Br. 8-9) that depriving district courts of power to punish contempt or violations of Rule 11 or Section 1927 after a voluntary dismissal will not alter the level of deterrence or prevent the victims of abusive litigation tactics from obtaining redress. According to ATLA, victims of Rule 11 and Section 1927 violations may bring a state common law action for malicious prosecution or abuse of process or an independent federal action under Section 1927. Meanwhile, the court that is the victim of a contempt may refer the matter to local disciplinary authorities or, according to petitioner (Br. 26-27), suspend the attorney from practicing before it.

This argument is completely at odds with a core purpose of the Federal Rules in general and Rule 11 in particular: reducing inefficiency in the rendering of justice. ATLA wants the judiciary to do in two separate proceedings what it easily and more effectively can do in one. But what conceivable benefit could be derived from denying the court that has overseen a lawsuit from beginning to end the power to rule on a

In light of the violence that petitioner's proposed exemption would do to the language and policies of Rule 11, it is not surprising that, with only one exception, every court to consider this contention has rejected it. See *Danik, Inc.* v. *Hartmarx Corp.*, Pet. App. 6a-10a; *Schering*, slip op. at 10-13; *Muthig* v. *Brant Point Nantucket, Inc.*, 838 F.2d 600, 603-604 (1st Cir. 1988); *Greenberg* v. *Sala*, 822 F.2d 882, 885 (9th Cir. 1987) (per curiam); *Szabo*, 823 F.2d at 1077-1079; *Kurkowski* v. *Volcker*, 819 F.2d 201, 203 (8th Cir. 1987). See also *Smith* v. *Phillips*, 881 F.2d 902, 904 (10th Cir. 1989) ("[a] court may have jurisdiction to order Rule 11 sanctions for conduct that occurred before a case was dismissed") (dictum); *Balfour Guthrie, Inc.* v. *Hunter Marine Transp., Inc.*, 118 F.R.D. 66, 78 (M.D. Tenn. 1987); Note, *The Use of Rule 11 Sanctions and Prevailing-Party Fee-Shifting Statutes After Rule 41(a)(1)(i) Notice of Dismissal*, 88 Colum. L. Rev. 1512, 1520-1525 (1988) (dismissal under Rule 41(a)(1)(i) does not bar imposition of sanctions under Rule 11). *Contra Johnson Chemical Co.* v. *Home Care Prods., Inc.*, 823 F.2d 28 (2d Cir. 1987).[7]

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motion for Rule 11 sanctions, while requiring the party seeking such sanctions to undertake the time and expense of researching, preparing, and filing a state law claim for abuse of process or malicious prosecution? Requiring the victim of a Section 1927 violation to bring a new lawsuit (complete with service of process, docketing, scheduling order, pre-trial conference, and perhaps extensive discovery) rather than allowing the judge in the original case to decide the issue is even more absurd.

[7] ATLA contends (ATLA Br. 6) that *Foss* v. *Federal Intermediate Credit Bank*, 808 F.2d 657, 660 (8th Cir. 1986),

As these courts have recognized, there is no persuasive reason for creating an exception to Rule 11 for plaintiffs who file voluntary dismissals. The attempts of petitioner and its amici to come up with such a reason are wholly inadequate. For example, petitioner's chief argument in the court of appeals and in its petition for certiorari was that, because a Rule 41(a)(1)(i) dismissal deprives the district court of jurisdiction to adjudicate the merits of the case, it necessarily also deprives the court of jurisdiction to take any other action in the case, including imposing Rule 11 sanctions for pre-dismissal conduct. In support of this proposition, petitioner relied almost exclusively upon *Johnson Chemical*. In that case, the Second Circuit held that "[o]nce [the plaintiff] had dismissed [its] action under Rule 41(a)(1)(i), the [district] court lost all jurisdiction over the action" and, accordingly, "[its] orders subsequent to the dismissal [including its order imposing Rule 11 sanctions] became a nullity." 823 F.2d at 31.

The decision in *Johnson Chemical* is wrong because it treats jurisdiction as an "all-or-nothing" principle. But as the Seventh Circuit has explained, the fact that a court has lost jurisdiction over the *merits* of a case does not necessarily mean that it loses jurisdiction over matters *collateral* to the merits:

> "Jurisdiction" is an all-purpose word denoting adjudicatory power. A court may have power to do some things but not others, and the use of

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is in accord with *Johnson Chemical*. The Eighth Circuit has since made clear, however, that *Foss* is limited to Rule 11 motions filed *after* a case is voluntarily dismissed. District courts in that circuit do not lose jurisdiction to decide Rule 11 motions that are pending *before* the dismissal. *Kurkowski*, 819 F.2d at 203 n.7.

> "lack of jurisdiction" to describe the things it may not do does not mean that the court is out of business.

Szabo, 823 F.2d at 107. Thus, while a voluntary dismissal may deprive a district court of adjudicatory power over the merits of a lawsuit, it does not render the court powerless to punish attorneys for misconduct that preceded the dismissal. See, *e.g.*, *Muthig*, 838 F.2d at 603 ("A court * * * always has jurisdiction to consider its own jurisdiction, and it has jurisdiction to punish with sanctions any abuse of its process committed during such consideration.") (citation omitted).

But for the stray holding in *Johnson Chemical*, the notion that a district court retains jurisdiction to punish attorneys who file frivolous complaints even after those complaints are dismissed would spark little debate. After all, there are an abundance of closely analogous circumstances in which a court loses jurisdiction over the merits of a claim but is free to punish those who abused the judicial process in pursuing the claim. See, *e.g.*, *Weil* v. *Markowitz*, 829 F.2d 166, 171 (D.C. Cir. 1987) (district court "retain[s] discretion to tailor Rule 11 sanctions" even after entering settlement order); *In re Ruben*, 825 F.2d 977, 981-982 (6th Cir. 1987) (district court retains jurisdiction to impose Rule 11 sanctions even after appeal has been dismissed), cert. denied, 108 S. Ct. 1108 (1988); *News-Texan, Inc.* v. *City of Garland, Texas*, 814 F.2d 216, 219 (5th Cir. 1987) (court retains power to impose Rule 11 sanctions after determining that there was no basis for removing case from state court); *McLaughlin* v. *Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir. 1986) ("it makes no difference that the District Court decided to impose the sanctions for the litigation only after the post-

judgment motions"); *Orange Production Credit Ass'n* v. *Frontline Ventures, Ltd.*, 792 F.2d 797, 801 (9th Cir. 1986) ("The fact that the district court lacked [subject matter] jurisdiction to consider the merits of the case did not preclude it from imposing [Rule 11] sanctions."); *Eash* v. *Riggins Trucking Inc.*, 757 F.2d 557, 559-560 (3d Cir. 1985) (en banc) (district court had jurisdictions to impose sanctions under either inherent power or 28 U.S.C. § 1927 even though case had been dismissed pursuant to stipulation); cf. *White* v. *New Hampshire Dep't of Employment Sec.*, 455 U.S. 445 (1982) (a request for attorney's fees under 42 U.S.C. § 1988 is not a motion to amend or alter judgment and therefore district courts retain jurisdiction to consider such requests indefinitely after judgment has been entered).

Perhaps realizing the severe weakness of its jurisdictional argument, petitioner all but abandons it in its merits brief. It now argues only that the plain language and policies of Rule 41(a)(1) mandate the the exception to Rule 11 that it advocates. Contrary to petitioner's contention, however, neither the language of Rule 41 nor its policies requires that result.

Rule 41(a)(1)(i) provides that "an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs" and that, as a general rule, "the dismissal is without prejudice." Nothing in the Rule states or even suggests that plaintiffs who file voluntary dismissals are immune from the consequences of actions they took while their cases were still pending.[8]

[8] Public Citizen contends (Pub. Cit. Br. 6) that because Rule 41(a)(1) contains explicit exceptions for Rules 23(e) and 66 as well as applicable statutes, this Court should decline to infer a Rule 11 exception. Rules 23(e) and 66 respectively provide that class actions and cases in which a receiver has been appointed may not be dismissed without the approval of the court. They thus plainly conflict with Rule 41(a)(1)'s provisions for dismissal without court approval. The drafters of the Rules therefore expressly exempted Rules 23(e) and 66 from the provisions of Rule 41(a)(1). Rule 11, by contrast, does not interfere with the right to dismiss cases without court approval. Accordingly, this Court need not infer a Rule 11 exception in order to allow both Rules to be fully enforced.

Petitioner nonetheless asserts (Br. 21-24) that the imposition of Rule 11 sanctions after a Rule 41(a)(1)(i) dismissal irreconcilably conflicts with a plaintiff's "unfettered right to dismiss," even if the Rule 11 motion was pending at the time of the dismissal. It points to two aspects of Rule 41 for this contention. First, it relies on Rule 41(a)(1)'s requirement that voluntary dismissals are "without prejudice." Second, it notes that Rule 41 denies courts the power to impose conditions on Rule 41(a)(1) dismissals. While petitioner is correct that Rule 41 guarantees that a party's first voluntary dismissal is without prejudice and can be obtained without court-imposed econditions, it is quite wrong in suggesting that when a court imposes Rule 11 sanctions for pre-dismissal conduct it interferes with either of those guarantees.

To begin with, the guarantee that voluntary dismissals may be obtained without prejudice means only one thing: if a plaintiff voluntarily dismisses a lawsuit, he will not be barred by *res judicata* principles from bringing that lawsuit at a later date. See C. Wright & A. Miller, *Federal Practice & Procedure* § 2367 (1971). Perhaps a plaintiff who is sanctioned for filing a baseless lawsuit will think twice before filing the same lawsuit a second time, but, except in

truly extraordinary circumstances, the sanction itself would not constitute a bar to doing so.[9]

Nor, of course, do Rule 11 sanctions interfere with the guarantee against court-imposed conditions on a plaintiff's right to take a voluntary dismissal. See C. Wright & A. Miller, *supra* § 2366. Rule 11 is addressed to *pre-dismissal* conduct. A court may not impose sanctions merely because a party wants to withdraw from a case. Rather, it must find that one or more of the party's prior court papers violated Rule 11. Conversely, once the court has found a Rule 11 violation, it is *required* by the language of the Rule to impose appropriate sanctions. The court has no discretion to use Rule 11 as a bargaining chip to either encourage or deter dismissals. Accordingly, post-dismissal Rule 11 proceedings stemming from pre-dismissal conduct cannot conceivably constitute a condition on the right of voluntary dismissal.

The policies of Rule 41 provide no more reason for emasculating Rule 11 than does Rule 41's plain language. Petitioner's suggestion (Br. 22-23) that attorneys with baseless or marginal complaints will refrain from voluntarily dismissing a case and instead undertake an expensive discovery process in the hope of uncovering the facts needed to fend off Rule 11 sanctions is wholly implausible. In fact, the incentive is quite the opposite: the sooner Rule 11 violators terminate their cases and stop imposing litigation costs on their opponents, the lower Rule 11 sanctions are likely to be. See *Szabo*, 823 F.2d at 1079. Moreover, assuming *arguendo* that allowing plaintiffs to escape the consequences of their conduct somehow could be seen as encouraging voluntary dismissals, there is no reason for extending this shield to plaintiffs' attorneys. It is simply unreasonable to suggest that protecting attorneys from their own Rule 11 violations will encourage plaintiffs to dismiss complaints.

Petitioner also asserts (Br. 26) that post-dismissal Rule 11 proceedings will "protract litigation, result in wasteful district court proceedings, and produce [additional] appeals," all in derogation of the efficiency goals of the Federal Rules in general and Rule 41 in particular. This argument loses the forest for the trees. No doubt if this Court creates the exception sought by petitioner, some post-dismissal proceedings will be eliminated, but these proceedings are likely to be both significantly fewer in number and substantially less burdensome in nature than the meritless lawsuits that will be filed as a result of the evisceration of Rule 11.

Petitioner finally contends (Br. 28-30) that unless the Court creates a blanket exception to Rule 11 for

[9] Petitioner points out (Br. 23) that *one* available sanction for Rule 11 violations is dismissal with prejudice. It then contends (*ibid.*) that because Rule 41(a)(1) provides that voluntary dismissals are without prejudice, courts can *never* impose Rule 11 sanctions of *any* kind after a voluntary dismissal. Because courts rarely dismiss a case with prejudice as a Rule 11 sanction (see Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1333 (1986)), it makes no sense to bar *all* Rule 11 sanctions on this ground. But even where such a sanction is imposed, it could not interfere with the Rule 41 guarantee because the bar on refiling would be a consequence of the violation of Rule 11, not of the voluntary dismissal of the claim.

voluntary dismissals, lower courts can keep jurisdiction over Rule 11 motions long after they have lost jurisdiction over the merits. It says that this is bad because a lawyer who has other matters before the same judge may be deterred from making legitimate arguments for fear that they might color the judge's view of the pending Rule 11 motion. To the extent that this chilling effect is not fanciful, it would be equally present when a Rule 11 motion is pending for a considerable period of time during an ongoing case. See generally Rule 11, Advisory Committee Note, 97 F.R.D. at 200 ("it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation"). Thus, petitioner's complaint is with Rule 11 itself, not with the use of Rule 11 after a dismissal.

In sum, neither the plain language nor the policies of Rule 41(a)(1) provide any reason for allowing litigants to evade Rule 11 sanctions simply by dismissing their cases voluntarily. To the contrary, the unambiguous language of Rule 11 and the broad purposes underlying the Rule plainly require that *all* violators of Rule 11 be subject to sanctions.[16]

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[16] Petitioner's suggestion (Br. 44 n.39) that the sanction award against it should be reversed for "plain error" on the basis of this Court's recent decision in *Pavelic & LeFlore* is without merit. Petitioner missed several available—and obvious—opportunities to raise the argument that sanctions could be imposed only against the two attorneys who actually signed the complaint. For example, even though the Fifth Circuit had established this rule in February 1987 (see *Robinson* v. *National Cash Register Co.*, 808 F.2d 1119), petitioner failed to raise the issue in either its December 1987 supplemental brief in the district court or its appeal to the D.C. Circuit. Moreover, despite this Court's grant of certiorari in *Pavelic & LeFlore* (109 S. Ct. 1116 (Feb. 21, 1989)), petitioner made no mention of the issue in its petition for certiorari six months later. It is well-settled that this Court will ordinarily not consider issues not raised below or in the petition for certiorari. See, *e.g.*, *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Nor does this case present the type of "exceptional circumstances" that might cause the Court to depart from its settled practice. See *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). Thus, this Court should not concern itself with the question of whether petitioner or the two attorneys who signed the complaint must pay the Rule 11 award.

The suggestion that petitioner did not waive this argument because it was somehow *respondents'* duty to appeal from the sanction award (Br. 44 n.39) is completely baffling. There is no reason why the *recipient* of a sanction award should appeal details of that award not contested by the sanctioned party.

II. THE CHOICE OF A STANDARD OF APPELLATE REVIEW IN RULE 11 CASES HAS NO BEARING ON THE OUTCOME OF THIS CASE AND THEREFORE PROVIDES NO BASIS FOR REVERSAL

The district court concluded that petitioner's prefiling investigation into the factual allegations of the complaint was unreasonable and therefore ran afoul of Rule 11. See Pet. App. 23a-24a. The court of appeals after reviewing the record and hearing oral argument, held that petitioner had committed two manifest Rule 11 violations: (i) failing to make any inquiry at all concerning the allegations against Hickey-Freeman; and (ii) failing to extend its in-

vestigation beyond four east coast cities notwithstanding the fact that the complaint alleged the existence of a nationwide conspiracy. *Id.* at 11a-13a. Petitioner asserts (Br. 32) that the court of appeals "appears to have evaluated" the district court's decision "under the 'abuse of discretion' standard." According to petitioner (Br. 30-31), the court should have invoked "a three-tier standard of review" under which the district court's factual findings would be subject to a clearly erroneous standard, the application of Rule 11 to those facts would be reviewed *de novo*, and the selection of the sanction imposed would be reviewed for abuse of discretion. Because, according to petitioner, the court of appeals applied the correct standard only to its review of the selection and amount of the sanction imposed, the case should be remanded for review under petitioner's trifurcated standard.

A. The Court Of Appeals Did Not Rely On An Abuse Of Discretion Standard In Affirming The District Court.

While we believe that the court of appeals could have properly deferred to the district court's discretion in this case, petitioner's argument is more fundamentally flawed. Nothing in the court of appeals' decision even remotely suggests that it applied an "abuse of discretion" standard in affirming the district court's finding of Rule 11 liability, or that the result it reached would have been any different under the standard of review that petitioner urges. To the contrary, while the court of appeals did not make explicit the standard of review it was employing, it is perfectly clear from its opinion that its finding that Rule 11 was violated did not rest on any deference to the conclusion of the district court, but instead reflected the court of appeals' own independent determination of the matter. A remand to the court of appeals therefore could not have any impact on the outcome of this case; accordingly, this Court should decline petitioner's invitation to resolve the split among the circuits over the correct standard of review and "await a day when the issue is posed less abstractly." *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Petitioner's view that the court of appeals employed an abuse of discretion standard of review in this case is based entirely on its observation (Br. 32 n.29) that the D.C. Circuit had used that standard in prior Rule 11 appeals. That may be so, but petitioner argued in its opening brief to the court of appeals (C.A. Br. 13-15) both that circuit precedent did not compel an abuse of discretion standard of review in *this* case and that "fairness to litigants and their counsel" required "a more particularized review of the factual and legal determinations comprising a Rule 11 decision than is accorded by the abuse of discretion standard." [11]

The court of appeals' statement of its reasons for affirming the district court's order suggests that it acceded to petitioner's argument. The D.C. Circuit's opinion is divided into six separate parts, one of which is headed "RULE 11 LIABILITY." Pet. App. 11a. Nowhere in that portion of its opinion does the court of appeals purport to defer to the factual findings or legal conclusions of the district court. In-

[11] Perhaps in response to petitioner's plea for "fairness," the court of appeals also allowed counsel to go well outside the record at oral argument. See C.A. Tr. 72-73.

stead, as the following excerpt from its opinion demonstrates, the court of appeals relied on petitioner's *own* description of its pre-filing inquiry and determined *de novo* that that description *compelled* a finding that Rule 11 had been violated (Pet. App. 11a) (emphasis added):

> We find no difficulty in affirming liability under Rule 11 here, as none of appellants' arguments calls into doubt the "two obvious deficiencies" that the district court identified in their pre-filing investigation of the facts: specifically, appellants failed to engage in any inquiry whatsoever concerning the allegations against [Hickey-Freeman] (as distinguished from [Hart, Schaffner & Marx]), and they claimed a nationwide conspiracy between defendants and selected merchants in each metropolitan area after polling merchants in only four eastern cities. [*Petitioner's*] *account of their efforts does no more than confirm those shortcomings;* * * * *It is impossible to see how "no inquiry" could be a "reasonable inquiry" with regard to the* [*Hickey-Freeman*] *allegation or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere.*

The court of appeals next (Pet. App. 11a-12a) considered and rejected petitioner's argument that, under the circumstances of this case, it should have been excused from making any further inquiry into its exclusive dealer allegations. Again, however, there is no indication that the appellate court's decision in any way resulted from deference to the district court's rejection of those arguments. Moreover, as if to illustrate the point that petitioner's affidavits

alone required a finding of a Rule 11 violation, the court found no need to consider that portion of the district court's order holding that petitioner's failure to conduct any inquiry into the alleged anticompetitive effects of respondents' supposed distribution practices was unreasonable. In language that, if anything, indicates that the D.C. Circuit engaged in the type of appellate review to which petitioner asserts it is entitled, the court of appeals noted that "[s]ince the district court applied the correct legal standard and offered substantial justification for its finding of a Rule 11 violation in other respects that go to the heart of the complaint, it is unnecessary for us to go further." Pet. App. 13a.

Further evidence that petitioner is wrong in arguing that the court of appeals' decision on Rule 11 liability was premised on review for abuse of discretion may be found in the section of the court's opinion addressing the amount of the Rule 11 sanction. Pet. App. 13a-14a. There, as petitioner concedes (Br. 31) was correct, the court of appeals deferred explicitly to the discretion of the district court.[12] Pet. App. 13a. No similar statement of deference was made in the liability portion of the court's opinion because the court in fact took a closer look at that district court determination than would be called for under an abuse of discretion analysis.

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[12] Petitioner's argument (Br. 38-39) that the case should be remanded so the court of appeals can determine again whether the amount of the sanction was an abuse of the district court's discretion is wholly out of place here. That issue —as opposed to issues concerning petitioner's liability—is not arguably related to any question that this Court agreed to decide. In fact, petitioner sought but did not obtain review of whether "the amount of sanctions awarded was so excessive as to constitute an abuse of discretion." Pet. (i).

In sum, petitioner has utterly failed to demonstrate that an abuse of discretion standard was in fact employed here or that the choice of a standard of review could possibly affect the outcome of this case.

B. In The Alternative, This Court Should Hold That Rule 11 Cases Should Be Reviewed Only For Abuse Of Discretion.

The circuits have split concerning the appropriate standard of review in Rule 11 cases. The overwhelming majority apply an abuse of discretion standard to the district court's determination of the facts, whether those facts constitute a violation of Rule 11, and what sanction is appropriate.[13] Petitioner, however, urges this Court to endorse the trifurcated system of review adopted by the Eighth and Ninth Circuits, in which the district court's findings of "fact" are reviewed under the clearly erroneous standard, its conclusions of "law" are reviewed *de novo*, and its determination of the appropriate sanction is reviewed for abuse of discretion.[14] If this Court concludes that

[13] See *Kale* v. *Combined Insurance Co.*, 861 F.2d 746, 756-758 (1st Cir. 1988); *Teamsters Local No. 430* v. *Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir.), cert. denied, 109 S. Ct. 128 (1988); *Stevens* v. *Lawyers Mutual Liability Insurance Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986); *Thomas* v. *Capital Security Services, Inc.*, 836 F.2d 866, 871-873 (5th Cir. 1988) (en banc); *Century Products, Inc.* v. *Sutter*, 837 F.2d 247, 250 (6th Cir. 1988); *Mars Steel Corp.* v. *Continental Bank N.A.*, 880 F.2d 928, 933 (7th Cir. 1989) (en banc); *Adamson* v. *Bowen*, 855 F.2d 668, 673 (10th Cir. 1988); *Donaldson* v. *Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987); *Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168, 1174-1175 (D.C. Cir. 1985).

[14] *Kurkowski* v. *Volcker*, 819 F.2d 201, 203 n.8 (8th Cir. 1987); *Zaldivar* v. *City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986).

it is appropriate to resolve that conflict in this case, it is clear that the recent decision in *Pierce* v. *Underwood*, 108 S. Ct. 2541 (1988), compels the adoption of the abuse of discretion standard. See *Adamson* v. *Bowen*, 855 F.2d 668, 673 n.7 (10th Cir. 1988) ("Many of the reasons advanced by the court in [*Underwood*] are generally persuasive in the Rule 11 context."); *Mars Steel*, 880 F.2d at 934 ("Although we think that deferential review is appropriate for the reasons we have given, *Pierce* v. *Underwood* [citation omitted] would provide a powerful impetus toward that conclusion even if we were otherwise disposed."). As the Court noted in *Underwood*, "[i]t is especially common for issues involving what can broadly be labeled 'supervision of litigation,' which is the sort of issue presented here, to be given abuse-of-discretion review." 108 S. Ct. at 2546 n.1.

In *Underwood*, this Court concluded that awards of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(b),(d), should be reviewed under the abuse of discretion standard because the district courts are "better positioned" than the courts of appeals to conduct the necessary inquiry. 108 S. Ct. at 2547.[15] The same holds true in Rule 11 cases. From its observation of and participation in settlement conferences and other pretrial activities, the district court often will have insights into factors rel-

[15] The EAJA permits the recovery of attorney's fees against the federal government if the district court determines that the government's litigation position was not "substantially justified." In *Underwood*, this Court defined "substantially justified" as entailing a determination of whether the government's position "ha[d] a reasonable basis in law and fact" (108 S. Ct. at 2550 n.2)—a determination strikingly similar to that of whether an attorney complied with Rule 11 by making a "reasonable inquiry" (Fed. R. Civ. P. 11) "into both the facts and the law." 97 F.R.D. at 198.

evant to the Rule 11 inquiry that are simply "not conveyed by the record." *Underwood*, 108 S. Ct. at 2547. For example, the determination of whether "counsel did enough investigation before filing depends on the context" of a given case. *Mars Steel*, 880 F.2d at 934. Consequently, the district court is best suited to determining whether an attorney's conduct was "reasonable[] under the circumstances." 97 F.R.D. at 198.

Moreover, *de novo* appellate review of mixed questions of fact and law, such as whether an attorney made a sufficient investigation before filing a complaint, would drain appellate resources without benefiting litigants in other cases. Like determinations of whether the government's position was "substantially justified," Rule 11 cases "involve multifarious, fleeting, special, narrow facts that utterly resist generalization" (*Underwood*, 108 S. Ct. at 2548 (quotation omitted)) by appellate courts. Each Rule 11 case is unique—it involves specific conduct under a particular set of circumstances—and what may be a "reasonable inquiry" in one situation may not be in another. See 97 F.R.D. at 198-199. In such contexts, contrary to petitioner's assertions (Br. 32-34), "the role of appellate courts in establishing and articulating rules of law is not at stake." *Mars Steel*, 880 F.2d at 933.[16]

[16] Petitioner attempts to distinguish *Underwood* by arguing that uniformity is necessary in the Rule 11 context because Rule 11 decisions have been inconsistent and have therefore "chilled" advocacy (Br. 32-35, 40-42; see also Pub. Cit. Br. 12-14). But petitioner fails even to address *Underwood*'s recognition that uniformity imposed by appellate decisions is not possible in some contexts or to provide any reason why Rule 11 cases are more susceptible to it than are EAJA cases. In any event, petitioner has not explained why uniformity cannot be achieved through an abuse of discretion standard. To the contrary, Public Citizen concedes (Pub. Cit. Br. 12) that, under any standard, "the court of appeals [may] give the benefit of the doubt to a trial judge in a close case." The only cases that remain are those in which a clear error was made or into which the district court injected its "animosit[y]" (Pub. Cit. Br. 13) or its "personal views." Pet. Br. 35. There is no reason why an appellate court could not correct these errors or indiscretions under an abuse of discretion standard or why district courts would not be deterred from considering inappropriate factors under that standard. See, *e.g.*, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971) (abuse of discretion standard requires the reviewing court to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment").

Finally, as in *Underwood*, abuse-of-discretion review would "implement [this Court's] view that a 'request for attorney's fees should not result in a second major litigation.'" 108 S. Ct. at 2549 (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983)). See also 97 F.R.D. at 201 (warning that Rule 11 should be applied so as to "assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of litigation over the imposition of sanctions"). The "complexity of the three-tiered standard creates additional work for district courts and additional issues for appeal." *Thomas*, 836 F.2d at 873. By contrast, the abuse of discretion standard—as applied in appeals of both the grant *and denial* of sanction motions—would limit the expense of satellite litigation while still permitting the courts of appeals to correct salient legal errors or indiscretions.

III. RULE 11 SANCTIONS PROPERLY INCLUDE FEES REASONABLY INCURRED IN DEFENDING THE AWARD ON APPEAL

This is a case in which petitioner brought a frivolous lawsuit, leading to the imposition of Rule 11

sanctions in the form of respondents' reasonable attorney's fees. Those fees included not only the costs incurred in defending against the frivolous suit, but also those incurred in obtaining sanctions in the district court. Petitioner then decided to appeal the award of sanctions, thereby placing respondents in the position of having to choose between incurring substantial additional attorney's fees or foregoing defense of the award in their favor. Although the court of appeals did not find petitioner's appeal to be frivolous, it did find the appeal to be meritless. Accordingly, it affirmed the award of district court fees and in addition directed that the district court award under Rule 11 additional sums to cover respondents' reasonable appellate fees.[17]

Petitioner then successfully sought review in this Court. The result has been further to multiply respondents' costs arising out of the inadequately investigated and baseless action that petitioner improperly brought more than six years ago. We do not here impugn petitioner's right to exhaust its appellate remedies; but the question remains whether respondents should bear the costs of petitioner's efforts in the event they prove to be—as they have thus far—non-meritorious. As we now show, the language and policies of Rule 11 support the court of appeals' holding that respondents' appellate attorney's fees

[17] The remand for an award of appellate attorney's fees is consistent with decisions of the First and Seventh Circuits, see *Muthig*, 838 F.2d at 607, and *Hays* v. *Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988), and contrary to decisions of the Fourth and Ninth Circuits, see *Basch* v. *Westinghouse Elec. Corp.*, 777 F.2d 165, 175 (4th Cir. 1985), cert. denied, 476 U.S. 1108 (1986), and *Orange Production Credit Ass'n* v. *Frontline Ventures Ltd.*, 801 F.2d 1581 (9th Cir. 1986).

are within the ambit of the sanctions authorized by the Rule.

A. Respondents' Appellate Fees Were Incurred "Because Of" Petitioner's Misconduct And Are Therefore A Proper Part Of Rule 11 Sanctions.

The inquiry into the recovery of reasonable appellate fees under Rule 11 must begin with the language of the Rule. See *Pavelic & LeFlore*, slip op. at 3. The last sentence of Rule 11 describes the allowable scope of the sanction as embracing the amount of expenses, including attorney's fees, "incurred *because of* the filing" (emphasis added). The question is whether respondents' appellate fees, which resulted from petitioner's appeal, were incurred "because of" the sanctionable filing. Certainly, it is indisputable that respondents would have incurred none of these expenses had the frivolous lawsuit not been filed. See *Muthig*, 838 F.2d at 607 ("[A] party who successfully defends a Rule 11 appeal incurs appellate expenses (including attorney's fees) 'because of' the Rule 11 violation."); *Borowski* v. *DePuy, Inc.*, 876 F.2d 1339, 1342 (7th Cir. 1989) ("Under [Rule 11's] make-whole policy, it is * * * appropriate to award all fees incurred *as a result of* the initial frivolous position, including fees for litigating the amount of fees to be awarded, without a separate independent finding of frivolousness at each stage of the proceedings such as a court of appeals is required to make prior to awarding fees under FRAP 38 (for a frivolous appeal).") (emphasis added). Accordingly, unless there was some intervening event that broke the chain of causation, Rule 11 would plainly appear to authorize imposition of appellate fees as part of the sanction it provides.

Petitioner makes no effort to argue that the decision of the court of appeals on appellate fees is con-

trary to the language of Rule 11. Amicus Chicago Council of Lawyers suggests (CCL Br. 38), however, that the chain of causation was broken here by Hartmarx's sanction motion or by the district court's decision to impose Rule 11 sanctions. Had sanctions not been imposed, respondents would not have incurred expenses defending them; therefore, the argument runs, fees incurred in litigating the issue of sanctions are not incurred "because of" the sanctionable filing. To begin with, this position has been uniformly rejected in the context of district court proceedings, even by those courts that deny appellate fee-shifting. See, *e.g.*, *Basch*, 777 F.2d at 174. And, of course, the causal nexus between sanctionable misconduct and appellate fees in defending an award of sanctions is identical to that between the misconduct and district court fees in securing sanctions in the first place. In any event, under the "traditional tort concepts" that CCL asserts should govern the causation issue (CCL Br. 38), the chain of causation is broken only if an intervening event is not foreseeable. See generally 4 F. Harper, F. James & O. Gray, *The Law of Torts*, § 20.5. It cannot seriously be contended that the district court's decision to impose sanctions as a result of a Rule 11 violation is not "foreseeable"; in fact, the Rule *requires* that result.

Several of petitioner's amici urge reversal on the ground that "Rule 11 applies exclusively to district court proceedings." ATLA Br. 17; see also CCL Br. 38-39; Pub. Cit. Br. 16. But that uncontroversial proposition does not support their conclusion. This is not a matter of imposing sanctions for petitioner's conduct in the court of appeals; it is a matter of delineating the scope of the sanctions attaching to its misconduct *in the district court*. Thus, the D.C. Circuit did not apply the standards of Rule 11 to any

papers filed with it; in fact, it specifically disclaimed authority to "award fees under Rule 11." Pet. App. 16a. The court of appeals "merely reaffirm[ed] that the district court's award under Rule 11 of expenses 'incurred because of' the unfounded filing should include appellate expenses reasonably incurred in defense of that award." *Ibid.* Accordingly, the court remanded the case so that the district court could "enter an appropriate award." *Ibid.* In defining the scope of permissible Rule 11 fee awards, the appellate court no more applied the rule to appellate proceedings than it does when it defines the type of conduct that is subject to Rule 11 sanctions. See, *e.g.*, *Eastway Constr. Corp.* v. *City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (reversing denial of sanctions and ordering the district court to impose sanctions).[18]

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[18] ATLA maintains (ATLA Br. 21-23) that requiring violators to pay the victim's appellate expenses would exceed the rulemaking authority delegated to the judiciary in the Rules Enabling Act, 28 U.S.C. § 2072. This Court should "decline to consider this argument since it was not raised by either of the parties here or below." *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981). In any event, the argument is wholly without merit. The increased sanctioning power conferred by amended Rule 11 was deemed necessary to "discourage [the] dilatory or abusive tactics" that plagued federal practice and "to streamline the litigation process by lessening frivolous claims or defenses." 97 F.R.D. at 198. As this Court has consistently held, "Rules which incidentally affect litigants' substantive rights do not violate [the Rules Enabling Act] if reasonably necessary to maintain the integrity of that system of rules." *Burlington Northern R. Co.* v. *Woods*, 480 U.S. 1, 5 (1987). See also *Marek* v. *Chesny*, 473 U.S. 1, 36-37 (1985) (Brennan, J., dissenting) ("[T]hose provisions of the Federal Rules that explicitly authorize * * * the assessment of fees against parties whose *unreasonable* conduct has violated the rules of litigation fall[] comfortably

Nor is there any merit to the suggestion (Pet. Br. 42; CCL Br. 32; PELA Br. 11; ATLA Br. 15-18; Pub. Cit. Br. 16-17) that Rule 11 cannot reach appellate fees because they are covered exclusively by Fed. R. App. P. 38, which authorizes awards of appellate fees only for frivolous appeals. The patent flaw in this argument is that the two provisions are addressed to different conduct. Civil Rule 11 speaks to the consequences attaching to misconduct in the district court; Appellate Rule 38 covers misconduct in the courts of appeals.[19] If a party or lawyer has not engaged in sanctionable misconduct in the trial court but takes a frivolous appeal, Rule 38 is the exclusive remedy provided by the procedural rules. Conversely, a nonfrivolous but unsuccessful appeal from sanctions imposed by the district court, such as in this case, raises an issue only under Rule 11.

True, when there is a frivolous appeal from an award of sanctions, the decision of the court of appeals means that the appellee's attorney's fees would be recoverable under both Rule 11 and Rule 38. But

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into the courts' authority to administer 'remedy and redress for disregard or infraction' of those rules.") (quoting *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14 (1941)) (emphasis in original).

[19] Rule 38 seeks to "penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and expense of defending the district court's judgment." *Burlington Northern*, 480 U.S. at 7. "It is * * * for the court of appeals, not the district court, to decide whether Rule 38 costs and damages should be allowed in any given case." *In re American President Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir. 1985). By contrast, Rule 11 fee-shifting is strictly a district court affair. The district court makes the initial determination to invoke the fee-shifting provisions of the Rule, determines the amount of the initial award, and sets the amount of a reasonable appellate attorney's fee.

there is nothing incongruous in this, for Rule 38 does not purport to be the exclusive source of fee-shifting authority, and it is not unusual for there to be two or more bases for shifting fees. See, *e.g.*, *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 767 (1980) (recognizing that the same conduct could give rise to fee-shifting under either Fed. R. Civ. P. 37 or the court's inherent power). In fact, as the Advisory Committee's Notes make clear, Rule 38 was specifically intended to complement another source of authority to shift fees incurred on appeal (28 U.S.C. § 1912). See 28 U.S.C. App., at 492-493. See also ATLA Br. 20 (noting the "existence of no less than six separate powers under which appellate misconduct can appropriately be sanctioned").

Thus, the mere existence of Rule 38 does not preclude district courts from including appellate attorney's fees in Rule 11 awards. Nor does Rule 11 prevent Rule 38 from achieving its stated punitive and compensatory objectives where the appeal itself is frivolous. In sum, it is no more reasonable to suggest, as petitioner does, that the partial overlap between the two rules makes appellate fees recoverable *only* when Rule 38 applies than it is to suggest that appellate fees should be available under Rule 38 *only* when there was a Rule 11 violation in the district court.[20]

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[20] In *Burlington Northern R. Co.* v. *Woods*, *supra*, an Alabama statute provided for a mandatory penalty in unsuccessful appeals from money judgments that had been stayed pending appeal. The Court held that the statute conflicted with Rule 38 in federal diversity actions because "the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation." 480 U.S. at 7. As demonstrated above, however, Appellate Rule 38 and Civil Rule 11 serve entirely different purposes. There is no

The correctness of the court of appeals' interpretation of Rule 11 is confirmed by the consistent practice in the case of other fee-shifting provisions. Almost without exception, these other statutes have been construed to cover both appellate fees and fees incurred in the fee-shifting part of the litigation. See, *e.g.*, *In re Pine*, 705 F.2d 936, 939 (7th Cir. 1983) (Truth-in-Lending Act); *Gagne* v. *Maher*, 594 F.2d 336, 344 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980) (42 U.S.C. § 1988); *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), aff'd, 465 U.S. 752 (1984) (Clayton Act). And, while petitioner correctly points out (Br. 42) that Rule 11 does not expressly "speak to the issue of further fees on appeal," neither do other fee shifting provisions that have been interpreted to reach appellate fees. See, *e.g.*, 15 U.S.C. § 1640(a)(3); 42 U.S.C. § 1988; 15 U.S.C. § 15. Nevertheless, as Judge Posner has noted, "a uniform body of law has grown up about [fee-shifting] statutes entitling a party who successfully invokes the statute to obtain reasonable fees incurred in obtaining the statutory fees, plus reasonable fees in defending the award on appeal. There is no reason to complicate this body of law by making an exception for Rule 11 fee-shifting." *Hays*, 847 F.2d at 419 (citation omitted).[21]

"indicat[ion]" that Rule 38 "occupies" Rule 11's "field of operation," any more than when some other fee-shifting provision is interpreted to allow for the recovery of appellate fees.

[21] The lone exception that we have located involves a split among the circuits over the Equal Access to Justice Act, 28 U.S.C. § 2412(d). Compare, *e.g.*, *Trichilo* v. *Secretary of Health and Human Services*, 823 F.2d 702 (2d Cir. 1987)

B. The Court Of Appeals' Ruling Regarding Appellate Fees Is Wholly Consistent With The Policies Underlying Rule 11 And With Principles Of Sound Judicial Administration.

Petitioner and its amici suggest that as a matter of policy those who have been sanctioned under Rule 11 should not be discouraged from taking non-frivolous appeals challenging those sanctions, and that Rule 11 accordingly should not embrace appellate fees among its sanctions. Pet. Br. 43-44; CCL Br. 47-48; PELA Br. 10-11; ATLA Br. 24-25; Pub. Cit. Br. 17-20. These arguments, of course, speak more to what should be done than to what has been done and are thus more appropriately addressed to the drafters of the Rule than to its interpreters. See *Pavelic & LeFlore*, slip op. at 6 (noting that the Court's "task is to apply the text, not to improve upon it"). In any event, policy considerations fully support the ruling below.

Appellate fee awards are entirely consistent with the objectives of Rule 11. The Rule is designed to "discourage dilatory or abusive tactics and * * * [to] lessen[] frivolous claims or defenses." 97 F.R.D. at 198. See also *National Hockey League* v.

(appellate fees should be shifted), with, *e.g.*, *Cornella* v. *Schweiker*, 741 F.2d 170 (8th Cir. 1984) (appellate fees should not be shifted unless the conduct at the appellate level violated the Act). (There is a petition for certiorari currently pending in a case presenting this question under EAJA. See *Commissioner* v. *Jean*, No. 89-601, petition filed October 1989.) Appellate fee-shifting pursuant to the EAJA presents sovereign immunity concerns not inherent in Rule 11 or other fee-shifting measures.

Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (general deterrence is a major purpose of the sanctioning provisions of the Federal Rules). This deterrent goal is clearly enhanced by the rule that violators can be required to bear the full costs of unsuccessful appeals of sanction awards. "The best way to control unjustified tactics in litigation is to ensure that those who create costs also bear them." *In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985). See also *Mickwee* v. *Hsu*, 753 F.2d 770 (9th Cir. 1985) (per curiam) ("When the trial court has imposed sanctions for failure to comply with discovery and the order is appealed, as a general rule attorney's fees should be awarded where the discovery order is upheld. Failure to award attorney's fees in such instances would substantially diminish the value of the award made in the trial court and thus frustrate the purpose of [Rule] 37."); Note, *The Dynamics of Rule 11*, 61 N.Y.U.L. Rev. 300, 331-332 (1986) ("The Rule 11 violator must be held accountable for the costs * * * of ascertaining the damages sustained by his Rule 11 violation.").

In addition to enhancing the Rule's overall deterrent force, appellate fee awards are necessary to preserve the credibility of the deterrence created by the original sanction award. Most Rule 11 awards are small relative to the cost of defending them on appeal. See Nelken, 74 Geo. L.J. at 1333 n.129. As a result, common sense suggests that many victims will opt either not to defend the award vigorously on appeal or not to defend it at all. See, *e.g.*, *Mars Steel*, 880 F.2d at 939 ("Pyrrhic victories are the stuff of history but hardly balm for legal wounds"); *Westmoreland*, 770 F.2d at 1179 ("[i]t is very possible that appellate expenses might exceed substantially the sanction in the district court, thus forcing many [victims] * * * to conclude that the vindication of the Rule 11 interest is not worth the candle"). In such cases, the Rule's deterrent effect would be undermined by a perceived ability to evade sanctions through an unopposed appeal. To be sure, the specific party let off the hook might occasionally be sufficiently "chastened" by the whole affair to stop abusing the judicial process. *National Hockey League*, 427 U.S. at 642. But "other parties to other lawsuits would [then] feel freer than * * * [the rule] contemplates they should feel to [engage in the proscribed conduct]." *Id.* at 643. In sum, it would severely undercut the force of Rule 11 were this Court to hold that the Rule cannot be invoked to require violators to bear the costs of appellate expenses that they create for others.

Petitioner is thus left to argue (Br. 43-44) that appellate fee awards will have a "chilling" effect on the willingness of attorneys to appeal from Rule 11 sanctions. But petitioner was not discouraged from taking its appeal in this case, notwithstanding the fact that the D.C. Circuit had previously held that appellate fees would be available to parties who were the victims of Rule 11 violations. See Pet. App. 16a. Nor do the First and Seventh Circuits, which have the same rule, suffer from an absence of Rule 11 appeals.[22]

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[22] See, *e.g.*, *Ballard's Service Center, Inc.* v. *Transue*, 865 F.2d 447 (1st Cir. 1989); *Kale* v. *Combined Ins. Co. of America*, 861 F.2d 746 (1st Cir. 1988); *Triad Associates, Inc.* v. *Chicago Housing Authority*, 1989 WL 154822 (7th Cir. Dec. 26, 1989); *Margulis* v. *CHS Acquisition Corp.*, 889 F.2d 122 (7th Cir. 1989); *Teamsters Local No. 579* v. *B&M Transit, Inc.*, 882 F.2d 274 (7th Cir. 1989).

Where the district court has made a clear error, it is reasonable to assume that an appeal will be filed despite the risk of appellate fee-shifting simply because the chance for reversal is high. At its core, then, petitioner's complaint is that those who are subject to fee awards in the district court will be encouraged to take a hard look at the likelihood of prevailing on appeal and may choose not to appeal in doubtful cases. Surely the loss of that sort of marginal appeal should not be lamented. To the contrary, this Court has repeatedly underscored the low social utility of attorney's fee litigation. See, *e.g.*, *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983) (warning that "[a] request for attorney's fees should not result in a second major litigation"); *Pennsylvania* v. *Delaware Valley Citizens' Council*, 483 U.S. 711, 730 (1987) (opinion of White, J.) ("[w]e have alluded to the * * * burdensome nature of fee litigation").

But even if meritorious sanction appeals would be discouraged to some extent by the threat of additional fee awards, that discouragement is amply offset by the Rule's purpose of deterring abusive litigation and lessening the burden on the judicial system. In *Bankers Life & Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988), this Court upheld against an equal protection challenge a Mississippi statute designed to deter frivolous appeals by assessing a mandatory penalty of 15% of the judgment against the appellant whenever a lower court's monetary award was affirmed without modification. This scheme was permissible even though "Mississippi may not have succeeded in eliminating all danger of deterring meritorious claims." *Id.* at 1644. Rule 11 reflects a similar—and equally acceptable—policy judgment.

In the same vein are arguments by petitioner's amici to the effect that the decision below is "manifestly unfair" to those who violate Rule 11 (ATLA Br. 24) or that "there is no general rule that [a] party's trial-court award must be protected against erosion by the expense of attorneys' fees in defending an appeal" (CCL Br. 30). The short—and dispositive—answer to these arguments is that Rule 11 was expressly designed to enable district courts to shift the cost of abusive litigation to the wrongdoer. It therefore alters the "general rule" that parties must bear their own litigation expenses. See Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 25 col. 2-3 (Rule 11 "alters the traditional American approach to costs and brings it closer to the British system."). Nor is this result unfair, because "[e]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen* v. *City of Independence*, 445 U.S. 622, 654 (1980). In any event, to the extent that that result is perceived by some to be "unfair," their complaint is with the Rule itself.

Finally, ATLA overstates the issue actually presented here when it suggests (ATLA Br. 24) that this Court must decide whether the affirmance of *every* Rule 11 sanction necessarily carries with it an award of appellate fees. No one disputes that district courts have wide discretion in choosing an appropriate Rule 11 sanction and are free to impose penalties other than an award of attorney's fees. Although we believe that the policies favoring appellate fees discussed above are valid in the context of an appeal from Rule 11 sanctions other than awards of attorney's fees, perhaps there is a colorable argument that non-attorney's fee sanctions should be treated differ-

ently. But the district court in this case explicitly invoked the fee-shifting provision of Rule 11 (Pet. App. 28a), thereby concluding that a full award of respondents' reasonable attorney's fees was an appropriate sanction for petitioner's misconduct. There is thus no reason to depart here from the standard practice of allowing the recovery of expenses incurred in defending an attorney's fee award on appeal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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